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13 **DIRECTV, INC.**

14 **UNITED STATES DISTRICT COURT**
15 **NORTHERN DISTRICT OF CALIFORNIA**

16 JACEN MANAGEMENT LLC, a Connecticut
17 limited liability company, on behalf of itself and
18 all others similarly situated,

19 Plaintiff,

20 v.

21 DIRECTV, Inc., a Delaware corporation,

22 Defendant.

Case No.: 3:11-cv-00384-WA

Hon. William Alsup

**DIRECTV'S NOTICE OF MOTION AND
MOTION TO DISMISS; MEMORANDUM IN
SUPPORT THEREOF**

Date: April 21, 2011
Time: 2:00 p.m.
Judge: Hon. William Alsup
Courtroom: 9

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NOTICE OF MOTION AND MOTION

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that in Courtroom 9 of this Court located at 450 Golden Gate Avenue, San Francisco, California, 94102, on April 21, 2011 at 2 p.m., or as soon thereafter as this matter may be heard, defendant DIRECTV, Inc. ("DIRECTV") will and hereby does move this Court for an order dismissing the complaint of Jacen Management LLC ("Jacen"), pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

DIRECTV requests that the Court dismiss Jacen's complaint in its entirety on the grounds that: (1) the Court lacks subject matter jurisdiction; (2) Jacen lacks standing under Fed. R. Civ. P. 12(b)(1); and (3) for failure to state a claim for which relief can be granted under Fed. R. Civ. P. 12(b)(6). This motion is based upon this Notice of Motion, the Memorandum of Points and Authorities, the Request for Judicial Notice filed herewith, and other papers and pleadings on file and on such other argument and evidence as may be presented to the Court at or prior to the hearing on this motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case is a putative class action based on a dispute over defendant DIRECTV, Inc.'s ("DIRECTV") authorization to install satellite television reception equipment ("Equipment") in residential rental properties at the request of tenants. Plaintiff Jacen Management LLC ("Jacen") is the owner of a Connecticut apartment building. It contends that DIRECTV has "encroached" upon its property and installed Equipment without its authorization at three tenants' units. Jacen alleges that DIRECTV's reliance on the tenants' certification in a DIRECTV document ("Permission Form") that the tenant obtained Jacen's consent for the installations is unlawful. Using the Permission Form as a springboard, Jacen asserts that DIRECTV's installation activity at rental properties across the country constitutes a trespass that can be pursued in a nationwide class action on the theory that such conduct is an "unfair" business practice and a negligent breach of a "legal duty not to invade" landlords' property without consent.

Jacen's putative class claim founders at the outset because this Court lacks subject

1 matter jurisdiction under the local action doctrine. The local action doctrine has been a fundamental
2 principle of federal court jurisdiction since at least 1811, and requires that suits involving real
3 property interests be brought in a forum encompassing the property. In the Ninth Circuit, the
4 character of an action is determined by the nature of the relief sought. Jacen seeks two forms of
5 relief, both of which involve the determination of real property rights and injury to real property:
6 (1) an injunction barring DIRECTV from entering Jacen's and the putative class members' property
7 without their written consent and requiring the removal of DIRECTV Equipment installed upon it,
8 and (2) tort damages premised on damage allegedly done to Jacen's building during the Equipment
9 installation. Under the applicable law, both these forms of relief are local in nature. Moreover,
10 Jacen's claims are founded upon trespass, which is the quintessential local action. Because the
11 Court lacks jurisdiction, it should dismiss the case.

12 While the jurisdictional inquiry ends the matter, even if the Court had subject matter
13 jurisdiction, it should abstain from exercising it. The doctrine of equitable abstention is well
14 established in California and is applied by courts to abstain from adjudicating actions where complex
15 regulatory schemes are implicated and which may result in the court's interference with the
16 functions of an administrative agency. That is precisely the situation here. The Federal
17 Communications Commission ("FCC") has exclusive jurisdiction to issue rules related to the
18 installation of satellite dishes under the Telecommunications Act of 1996 and has issued the Over-
19 the-Air-Reception Devices ("OTARD") Rule. Jacen's requested relief is a nationwide injunction
20 requiring DIRECTV to obtain the landlord's consent in writing before performing *any* Equipment
21 installations and to seek consent a second time where installations have already been performed and
22 remove Equipment if the landlord will not grant it. Such an injunction is tantamount to an FCC rule
23 and should only be issued by the FCC after due consideration and an appropriate comment period in
24 accordance with federal law. *See* 47 U.S.C. § 253(d); 47 C.F.R. §§ 1.401-1.425.

25 Jacen has also failed to allege sufficient facts to establish that it has suffered any
26 cognizable injury. Jacen's claims are premised on assertions that DIRECTV did not have
27 authorization to install the Equipment; however, landlord consent is often not required, as a matter of
28 law. Under the FCC's OTARD Rule, DIRECTV has no obligation to obtain consent from landlords

1 when installing satellite dishes in areas within the “exclusive use or control” of the tenant. 47 C.F.R.
2 § 1.4000(a). Such areas include the balcony, balcony railing and patio of an apartment unit and are
3 even broader in townhomes, condominiums and single family residences. Whether landlord consent
4 is necessary turns on the specific terms of the tenant’s lease and the location and method of the
5 installation. The complaint, however, does not attach any of the three leases at issue, or allege where
6 or how the Equipment was installed. Jacen pleads only that the Equipment is installed in “areas” of
7 its property and conclusorily that it is installed “illegally.” Cmplt., ¶ 18. Absent well-pleaded facts
8 establishing that the three installations at issue are outside of the exempted areas governed by the
9 OTARD Rule, Jacen has not established that it has suffered an injury.

10 Secondly, Jacen has not pled that it did not consent to the installation of the
11 Equipment at the three tenants’ units. Rather, Jacen alleges that its tenants completed Part 2 of the
12 Permission Form in which they certified that Jacen had provided them with consent. Jacen carefully
13 alleges only that *DIRECTV* did not obtain Jacen’s consent. There is no legal requirement, FCC or
14 otherwise, that *DIRECTV* interface directly with a landlord to obtain landlord consent. Absent
15 express allegations that Jacen never consented, both Jacen’s claims fail for lack of injury and
16 causation, and Jacen lacks Article III standing for the same reason.

17 Finally, *DIRECTV*’s Permission Form does not violate the UCL. Jacen makes no
18 claim that *DIRECTV* has committed an unlawful or fraudulent practice. It instead attempts to show
19 unfairness by alleging that Jacen’s Connecticut-based claim is tethered to California’s willful
20 trespass statute, Cal. Penal Code § 602(m). Yet the purpose of that statute is to prevent squatting
21 and the intentional, permanent occupation of property in California. *DIRECTV*’s alleged practice of
22 obtaining landlord consent in written or verbal form in interactions with the tenants does not violate
23 the public policy embodied in that statute (or any other).

24 In sum, the complaint should be dismissed for want of subject matter jurisdiction
25 under the local action doctrine. Even if the Court concludes that it has jurisdiction, it should abstain
26 from exercising it in light of the FCC’s exclusive jurisdiction to rule-make in this area. Finally,
27 Jacen’s claims cannot stand because it has failed to plead injury or a violation of the UCL.

1 **II. STATEMENT OF FACTS**

2 Plaintiff Jacen Management LLC is a limited liability company organized under the
3 laws of Connecticut. Cmplt., ¶ 3. Jacen owns an apartment building in Hartford, Connecticut
4 consisting of 16 residential rental units. *Id.*

5 DIRECTV is the nation's largest direct broadcast satellite television provider. To
6 receive DIRECTV's service, a customer must have a satellite dish connected by a cable to at least
7 one integrated receiver-decoder ("receiver") within the customer's home. The satellite dish may be
8 mounted anywhere with a clear view of the southern sky, where it receives encoded signals
9 transmitted by DIRECTV's fleet of satellites in geosynchronous orbit over the United States. The
10 signals are decrypted by the receiver and displayed on the customer's television.

11 Jacen contends that "DIRECTV installs the Equipment by drilling holes in the
12 building and bolting or otherwise permanently affixing the Equipment to the building." *Id.*, ¶ 8.
13 Jacen alleges that DIRECTV requires its subscribers who reside in rental property to complete a
14 form before the installation of the Equipment ("Permission Form"). *Id.*, ¶ 12. Part 1 of the
15 Permission Form provides a space for the landlord to sign, indicating his authorization for the
16 installation in writing. *Id.*, ¶ 11. Alternatively, in Part 2 of the form, the tenant signs, certifying that
17 they have obtained verbal authorization from the landlord. *Id.* The Permission Form states:

18 DEAR PROSPECTIVE DIRECTV CUSTOMER,

19 Congratulations on your decision to sign up for DIRECTV® service! You have
20 made the best choice in digital television entertainment and we are confident you
will be thrilled with the service.

21 **To ensure you have a smooth installation experience, if you do not own the**
22 **residence in which you intend to install your DIRECTV® System, we ask**
that you obtain landlord approval prior to any installation if necessary.

23 Installation of a DIRECTV System may involve modifications to the residence.
24 While these modifications are often minor, standard professional installation
25 many times includes the drilling of holes in order to run cable and attaching a
26 dish securely to the outside of the structure. Any such type of modification may
be forbidden pursuant to the terms of your lease/rental agreement or may require
pre-approval by the landlord. **Please be advised that landlord approval is**
often the case with multi-tenant apartment buildings.

27 You should carefully review your lease agreement to determine if you have the
28 right to make such modifications. **If landlord approval is required, please**
request that the landlord, or its authorized representative, sign the bottom

of this form to acknowledge authorization for the installation and provide this signed form to the DIRECTV technician at the time of installation. In the alternative, if landlord verbally gives you permission (or if landlord approval is not required pursuant to your lease or rental agreement), please indicate that below and sign as well.

. . . .

Permission Form, RJN, Ex. A (emphasis added).¹

Jacen contends that DIRECTV does not seek approval *directly* from the landlord, and relies on the written authorization provided by the landlord in Part 1 of Permission Form or the certification of verbal authorization by the landlord in Part 2 of the form provided by the tenant.² See Cmplt., ¶ 12. Jacen makes no allegation that any particular landlord has not, in fact, given its consent for the installation of any particular DIRECTV Equipment on its property. As to its own property, Jacen alleges: “Within the past three years, Defendant has provided its service to at least three tenants of residential units at Defendant’s [sic] Property, and has permanently and illegally installed and maintained the Equipment in areas of the Property without obtaining any authorization from Plaintiff.” *Id.*, ¶ 18. Jacen does not identify these tenants, the “areas” where the systems were installed, or the date of the installations. Notably, Jacen makes no allegation as to whether it gave its consent to the three tenants for the installations.

Jacen pleads claims for a violation of California’s Unfair Competition Law, Bus. & Prof. Code § 17200 *et seq.* and negligent violation of a “duty not to invade the Property of Plaintiff,” and seeks injunctive relief and damages. Jacen seeks to certify a nationwide class defined as: “all persons or entities that own and lease residential real estate in the United States ... upon which Defendant DIRECTV or its agents ... have permanently installed DIRECTV Equipment after obtaining Part 2 of a DIRECTV Release Form to the installation of the Equipment.” Cmplt., ¶ 19.

¹ “Even if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff’s claim.” *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). The court “may treat such a document as part of the complaint, and may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6).” *Movassate v. Dudley Ridge Props., LLC*, No. 10-CV-02313-LHK, 2011 WL 672773, at *4 (N.D. Cal. Feb. 16, 2011).

² Jacen does not challenge DIRECTV’s use of Part 1 of the Permission Form.

1 **III. DISCUSSION**

2 **A. This Court Lacks Subject Matter Jurisdiction Over Jacen's Claims Because This** 3 **Is A Local Action That May Only Be Brought In Connecticut Courts.**

4 The "local action" doctrine vests exclusive jurisdiction over actions involving land in
 5 the forum where the land is located.³ *Ellenwood v. Marietta Chair Co.*, 158 U.S. 105, 108 15 S.Ct.
 6 771, 39 L.Ed. 913 (1895) (finding that the federal court in Ohio "had no jurisdiction of the cause of
 7 action" alleging a trespass upon land in West Virginia); *Livingston v. Jefferson*, 15 F.Cas. 660, 664
 8 (Va. Cir. Ct. 1811) (holding that the local action doctrine imparts a limitation on a court's
 9 jurisdiction over trespass case); *see also Columbia River Packers' Ass'n v. McGowan*, 219 F. 365,
 10 377 (9th Cir. 1914) ("[W]here the suit is strictly local, the subject-matter is specific property, and the
 11 relief when granted is such that it must act directly upon the subject-matter, and not upon the person
 12 of the defendant the jurisdiction must be exercised in the state where the subject-matter is situated");
 13 *United States v. Byrne*, 291 F.3d 1056, 1060 (9th Cir. 2002) ("The federal district courts' jurisdiction
 14 over actions concerning real property is generally coterminous with the states' political
 15 boundaries.").

16 The local action doctrine applies in cases like Jacen's where the action seeks some
 17 form of right or interest in real property. In the Ninth Circuit, the question of whether the action is
 18 local or transitory is to be determined by the law of the forum state. *Josevig-Kennecott Copper Co.*
 19 *v. James F. Howarth Co.*, 261 F. 567, 569 (9th Cir. 1919); *Prawoto v. Primelending*, 720 F. Supp.
 20 2d 1149, 1154 (C.D. Cal. 2010) (district court in Ninth Circuit bound to apply state law in
 21 determining local action); *see also Miller & Lux Inc. v. Nickel*, 149 F. Supp. 463, 467 (N.D. Cal.
 22 1957) ("Moreover, there is respectable authority indicating that the state law is to be taken into
 23 consideration in settling the local versus transitory question."). California Code of Civil Procedure

24
 25 ³ As explained in the excellent discussion in *Prawoto v. Primelending*, 720 F. Supp. 2d 1149 (C.D.
 26 Cal. 2010), the doctrine developed from *Livingston v. Jefferson*, 15 F.Cas. 660 (Va. Cir. Ct. 1811), in
 27 which Edward Livingston sued Thomas Jefferson for the federal government's seizure of land along
 28 the Mississippi River in New Orleans. Livingston sued Jefferson in Virginia where he resided.
 Chief Justice John Marshall, riding circuit, analyzed the ancient English common law distinction
 between transitory and local actions. Justice Marshall held that the cause of action sounded in
 trespass, and was therefore local and must be brought in New Orleans. *Id.* at 664.

1 Section 392 defines a local action as one seeking a determination or recovery of an interest in
 2 property, as well as for injuries to property. Cal. Civ. Proc. Code § 392(a). In applying Section 392,
 3 courts “generally look to the main relief sought, as determined from the complaint.” *Prawoto*, 720
 4 F. Supp. 2d at 1155 (*quoting K.R.L. P’ship v. Super. Ct.*, 120 Cal.App.4th 490, 496-97 (2004))
 5 (*citing Massae v. Super. Ct.*, 118 Cal.App.3d 527, 530 (1981)).

6 In this case, Jacen’s proposed remedy under its first claim is an injunction prohibiting
 7 DIRECTV from “permanently installing or maintaining Equipment without permission from the
 8 Landlord or authorized agent of the Landlord, and requiring DIRECTV to either obtain Landlord
 9 consent for all previously installed Equipment or remove that Equipment from the Landlord’s
 10 property.” Cmpl’t., ¶¶ 32-33 & Prayer, (b). Jacen also seeks to recover property damage caused by
 11 DIRECTV’s alleged wrongful invasion of its property in its second cause of action. *Id.*, ¶¶ 37-38 &
 12 Prayer, (c).

13 Under California law, the “main relief” this case seeks is local in nature. By its
 14 express terms, the proposed two-part injunction seeks to prohibit DIRECTV’s unconsented entry
 15 onto and modification of real property (i.e., trespass), and to require DIRECTV to remove
 16 Equipment affixed to real property. A suit for an injunction against wrongful possession of land is
 17 local and within Section 392. *Williams v. Merced Irrigation Dist.*, 4 Cal.2d 238, 241 (1935) (Section
 18 392 applicable to action for injunction and damages caused by reason of unconsented entry upon
 19 land).⁴ The second part of the injunction, an order to remove an encroachment on property, also
 20 arises from trespass and is local. *See, e.g., Warsaw v. Chicago Metallic Ceilings, Inc.*, 35 Cal.3d
 21 564, 572-73 (1984) (affirming order for removal of structure completed by underlying landowner
 22 which interfered with easement); *Fairrington v. Dyke Water Co.*, 50 Cal.2d 198, 201 (1958)

24 ⁴ Trespass, which is encompassed within the broader “injury to real property” definition of Section
 25 392, may occur not only with unconsented entry upon land, but also if the party, entering pursuant to
 26 a limited consent, i.e., limited as to purpose or place, proceeds to exceed those limits by divergent
 27 conduct on the land of another. *Restatement (Second) of Torts* § 168 (1965) (“A conditional or
 28 restricted consent to enter land creates a privilege to do so only in so far as the condition or
 restriction is complied with.”); *Civic Western Corp. v. Zila Indus., Inc.*, 66 Cal.App.3d 1, 17 (1977)
 (trespass committed when defendant had limited authority to enter property to remove personal
 property but exceeded consent when defendant entered and ejected other landlord’s employees and
 changed the locks to the property).

(mandatory injunction requiring removal of such sign as it was an encroachment within an easement). Similarly, a suit for tort damages arising from damage to a building is also local in nature, even though the relief is monetary. *Foundation Engineers, Inc. v. Super. Ct.*, 19 Cal.App.4th 104, 111-12 (1993) (holding “[a]n action may essentially be local although it seeks damages” and concluding that “the essence of the action [for construction defect] is for injuries to real property as the alleged damages are to buildings affixed to real property”). As *Foundation Engineers* explained further, “[w]hen an injury to real property or a building affixed to real property or a part of the building is alleged, trial in the county where the building is located will facilitate examination of the alleged damage by expert witnesses and by the fact finder.” *Id.* at 113. In reaching its decision that the relief pertained to “injury to property” within the meaning of Section 392, the court distinguished other cases where the injury to property arose from breach of a (construction) contract. *Id.* Here too, Jacen does not base its claim for property damage on breach of a contract with DIRECTV; it is a tort claim, founded on DIRECTV’s alleged illegal trespass on the property.

Therefore in this case, *both* forms of relief sought by the plaintiff are local in nature, thus, there is no question the action is local and the “main relief” rule (used to determine the character of a “mixed” local / transitory action) is unnecessary. *Massae*, 118 Cal.App.3d at 536 (“if all of the relief should be similarly characterized, the ‘main relief rule’ will not be needed.”).

Beyond the “main relief” rule, the action is local because it is grounded in trespass. Even though Jacen labels his second cause of action as one for simple negligence, the Court should look at the substance of the allegations rather than the plaintiff’s characterization to determine its true nature. *See, e.g., DeCoe v. Gen. Motors Corp.*, 32 F.3d 212, 216 (6th Cir. 1994) (not bound by “well-pleaded complaint” rule, but looks to essence of plaintiff’s claim to determine whether plaintiff is attempting to disguise what is essentially a contract claim as a tort of interference with contract); *Jarbough v. Attorney Gen. of U.S.*, 483 F.3d 184, 189 (3d Cir. 2007) (looking beyond the label attached by party to characterize the claim to determine whether the court has jurisdiction over the claim); *Williams v. McDaniel*, 119 F. Supp. 247, 250 (D. Nev. 1953) (looking to the substance of the pleading rather than to its form when plaintiff’s so-called second cause of action merely set forth items of damages growing from the transaction or alleged wrong, which was the basis of plaintiff’s

1 first cause of action); *In re Bausch & Lomb Inc. Contacts Lens Solution Prods. Liab. Litig.*, No.
 2 MDL 1785, 2008 WL 2308759, at *7 (D.S.C. Apr. 9, 2008) (treating an improper claim for “unjust
 3 enrichment” as one for restitution because plaintiff labeled the claim as “unjust enrichment” but gave
 4 the elements for restitution based on unjust enrichment).

5 What Jacen has described as a negligence claim is really a negligent trespass cause of
 6 action, as it is based on the duty to not “illegally invade the Property of Plaintiff and Class Members
 7 without consent to install the Equipment.” Cmpl., ¶ 35. This, of course, defines negligent trespass
 8 precisely: “The essence of the cause of action for trespass is an ‘unauthorized entry’ onto the land of
 9 another. . . . Where there is a consensual entry, there is no tort, because lack of consent is an
 10 element of the wrong.” *Civic Western Corp. v. Zila Indus., Inc.*, 66 Cal.App.3d 1, 16-17 (1977);
 11 *Miller v. Nat’l Broad. Co.*, 187 Cal.App.3d 1463, 1480 (1986); see 5 Witkin, *Summary of California*
 12 *Law, Torts* § 696 (10th ed. 2005), at 1021-1022. Similarly, Jacen alleges that its UCL claim is
 13 tethered to California’s criminal trespass statute, and one of the alleged unfair practices is “[e]ntering
 14 and encroaching on Plaintiff’s and class members’ property and illegally installing and maintaining
 15 its Equipment for its own profit without authorization from Plaintiff and class members.” Cmpl., ¶¶
 16 30(a), 32. Trespass claims are inherently local, and have been for at least 200 years. *Kingsborough*
 17 *v. Sprint Commc’ns Co.*, 673 F. Supp. 2d 24, 31 (D. Mass. 2009) (“Modern federal courts have
 18 consistently read *Livingston* to mean that ‘an action for trespass to land, although an *in personam*
 19 action seeking monetary relief, was nevertheless local in nature.’”) (citing *Hayes v. Gulf Oil Corp.*,
 20 821 F.2d 285, 287 (5th Cir. 1987)).

21 This case is in many ways similar to *Kingsborough*. In *Kingsborough*, landowners
 22 brought a nationwide class action against Sprint and two other telephone companies based on their
 23 installation of fiber optic cables on railroad rights-of-way overlying plaintiffs’ lands. After years of
 24 litigation involving dozens of lawsuits, plaintiffs mediated a global settlement and sought to have it
 25 entered in the District of Massachusetts. At the final approval hearing, the court sustained an
 26 objection to the settlement based on the local action doctrine and ruled that it lacked subject matter
 27 jurisdiction over the non-Massachusetts-based claims. *Id.* at 31-34. The court focused on the nature
 28 of claims, which sounded in trespass:

The issues of trespass and land ownership are at the heart of all of [Plaintiffs'] claims, rendering them essentially local in nature **Plaintiff's primary claim is one for trespass – that is, a claim that Defendants installed fiber-optic cable on his land without his permission. The other claims also derive from the alleged unlawful use of the land. In all three claims, the parties' ownership interests in the land are essential elements. If Defendants have not unlawfully used Plaintiff's land, none of Plaintiff's claims will stand.** The potential for dispute over land ownership is a major reason that courts have characterized trespass actions as local, and Plaintiff's claims hinge on the dispute over land ownership. Thus, they are essentially local in nature.

Kingsborough, 673 F. Supp. 2d at 32-33 (emphasis added) (*quoting Hallaba v. Worldcom Network Servs., Inc.*, 196 F.R.D. 630, 647 (N.D. Okla. 2000)).

Here, just as in *Kingsborough*, the unauthorized use of land comprises the core of this litigation, and the relief sought is local in nature under California law. Jacen's chief complaint is that DIRECTV installed satellite equipment on its land without its permission. Both the negligence and the UCL claims are derived from the alleged unlawful use of Jacen's property, and Jacen's ownership interests in the property are essential elements of each of these claims. Moreover, as with *Kingsborough*, there are no contract claims at issue here: Jacen has no contractual relationship whatsoever with DIRECTV. And, as there, the plaintiff seeks an injunction requiring the removal of the unauthorized property installed by the defendant. *See Kingsborough*, 673 F. Supp. 2d at 33. Thus, the "heart of the claims presented requires a determination as to the title and land ownership. The case affects the property rights of thousands – if not hundreds of thousands – [of] individual landowners across the United States. . . . The very heart of this matter sounds in trespass and concerns disputes over the ownership of the land." *Id.*

In sum, this Court lacks subject matter jurisdiction over this action and therefore must dismiss it, pursuant to Fed. R. Civ. P. 12(b)(1).

B. DIRECTV Is Also Entitled To Dismissal Under Fed. R. Civ. P. 12(B)(6).

Even if the Court were to conclude that it has subject matter jurisdiction, DIRECTV would still be entitled to dismissal because Jacen has failed to state valid claims under Fed. R. Civ. P. 12(b)(6). Dismissal should be granted where the Complaint fails to state facts that would support relief. *See Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). "While a complaint

1 attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's
 2 obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and
 3 conclusions, and a formulaic recitation of the elements of a cause of action's elements will not do."
 4 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964-1965, 167 L. Ed. 2d 929
 5 (2007); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) ("Threadbare
 6 recitals of the elements of a cause of action, supported by mere conclusory statements, do not
 7 suffice."). Rather, the allegations "must be enough to raise a right to relief above the speculative
 8 level." *Twombly*, 550 U.S. at 555. The plaintiff must allege a plausible claim for relief. *See Iqbal*,
 9 129 S. Ct. at 1949 ("The plausibility standard is not akin to a 'probability requirement,' but it asks
 10 for more than a sheer possibility that a defendant has acted unlawfully.") (*quoting Twombly*, 550
 11 U.S. at 556-57). "Conclusory allegations of law and unwarranted inferences are insufficient to
 12 defeat a motion to dismiss for failure to state a claim." *Epstein v. Wash. Energy Co.*, 83 F.3d 1136,
 13 1140 (9th Cir. 1966).

14 Dismissal is also required if a claim "presents a cognizable legal theory yet fails to
 15 plead essential facts under that theory." *Marketing Info. Masters, Inc. v. Board of Trustees*, 552 F.
 16 Supp. 2d 1088, 1092 (S.D. Cal. 2008); *accord Robertson v. Dean Witter Reynolds, Inc.* 749 F.2d
 17 530, 534 (9th Cir. 1984). As discussed below, the Court should abstain from hearing Jacen's UCL
 18 claim because it interferes with the jurisdiction of the FCC and Jacen has failed to plead facts that
 19 establish injury in fact and causation, both of which are essential to Jacen's UCL and negligence
 20 claims (Counts I and II).

21 The numerous and fatal deficiencies with Jacen's class action allegations (Cmplt., ¶¶
 22 19-27) are set forth more fully in DIRECTV's accompanying Motion to Strike. With regard to
 23 Jacen's allegation that California law "applies to the claims of plaintiff and all class members
 24 nationwide," (*id.*, ¶ 26), DIRECTV categorically refutes this assertion and strongly disputes the
 25 accuracy of the "Class Action Allegations" set forth in the Complaint. However, it is premature for
 26 the Court to conduct the required choice of law analysis, given the paucity of facts at this stage. *See*
 27 *Portney v. CIBA Vision Corp.*, No. SACV 07-0854, 2008 WL 5505517, at *2 (C.D. Cal. July 17,
 28 2008) (finding that a conflict of law analysis was premature at the motion to dismiss stage).

1 Therefore, for the purposes of this motion, DIRECTV addresses the claims as they are alleged in the
 2 Complaint, asserting California law. DIRECTV reserves all rights to challenge the applicability of
 3 California law to Jacen's claims, including but not limited to the material conflicts of law existing
 4 between California and Connecticut's consumer protection statutes.

5 **C. The Court Should Dismiss Jacen's UCL Claim Under The Doctrine Of**
 6 **Equitable Abstention.**

7 Under California's equitable abstention doctrine, the Court has discretion to dismiss
 8 Jacen's UCL claim on the basis that Jacen's request for injunctive relief requires the Court to invade
 9 the rulemaking province for satellite dishes exclusively reserved to the FCC. *See Desert Healthcare*
 10 *Dist. v. Pacificare, FHP, Inc.*, 94 Cal. App. 4th 781, 795 (2001) ("because the remedies available
 11 under the UCL, namely injunctions and restitution, are equitable in nature, courts have the discretion
 12 to abstain from employing them"). It is well-settled that "[j]udicial abstention is appropriate when
 13 granting the requested relief would require a trial court to assume the functions of an administrative
 14 agency, or to interfere with the functions of an administrative agency." *Alvarado v. Selma*
 15 *Convalescent Hosp.*, 153 Cal. App. 4th 1292, 1298 (2007); *see also Shamsian v. Dep't. of*
 16 *Conservation*, 136 Cal. App. 4th 621, 642 (2006) (holding equitable abstention barred UCL claim
 17 where judicial intervention would "interfere" with the Department of Conservation's "complex
 18 statutory arrangement"); *Samura v. Kaiser Foundation Health Plan, Inc.*, 17 Cal. App. 4th 1284,
 19 1301-02 (1993) ("the courts cannot assume general regulatory powers over health maintenance
 20 organizations through the guise of enforcing ... § 17200").

21 By seeking a nationwide injunction, Jacen has asked this Court to assume the role of
 22 the FCC and impose significant requirements regarding how DIRECTV, and potentially other
 23 satellite television dish providers, are to conduct satellite installations nationwide. As to
 24 DIRECTV's future Equipment installations, Jacen seeks an injunction prohibiting DIRECTV
 25 installing Equipment without consent of the landlord. Cmplt., Prayer, (b). Although couched in
 26 prohibitory terms, effectively this is a mandatory injunction that seeks to impose a requirement that
 27 DIRECTV obtain written consent from landlords before conducting any installations. The entire
 28 purpose of Jacen's suit is to challenge DIRECTV's practice of obtaining verbal consent from

landlords in Part 2 of the Permission Form; consequently, it is a fair inference that the relief Jacen seeks is to require DIRECTV to obtain advance written authorization from the landlord in every circumstance. Indeed, this is the practice that Jacen approvingly alleges DIRECTV's competitor, Dish Network, follows⁵ and Jacen does not challenge DIRECTV's use of Part 1 of the Permission Form in which tenants obtain the landlords' written authorization. *See* Cmplt., ¶14. The second part of Jacen's requested injunction unquestionably is mandatory and seeks to compel DIRECTV to obtain a *second* authorization from landlords where Equipment has already been installed based on verbal authorizations under Part 2 of the Permission Form, and if the landlords do not consent, DIRECTV must remove the Equipment. Cmplt., Prayer, (b).

The Telecommunications Act of 1996 granted the FCC "*exclusive jurisdiction to regulate the provision of direct-to-home satellite services*" 47 U.S.C. § 303(v) (emphasis added). The Act further mandates that the FCC promulgate regulations to prohibit restrictions that impair a viewer's ability to install, maintain, or use over-the-air reception devices. *See* § 207 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). Consistent with Congress' directive, the FCC has implemented an extensive regulatory scheme – including the OTARD Rule – which governs the installation, maintenance, and use of satellite dishes on rental property. *See In re Preemption of Local Zoning Regulation of Satellite Earth Stations and Restrictions on Over-the-Air Reception Devices*, FCC 98-273, 1998 WL 888546 (F.C.C. Dec. 23, 1998) (hereinafter, "Second Report and Order"). Although the FCC, in its discretion, has to date chosen to limit the OTARD Rule to areas within the exclusive use or control of tenants (*see id.*), the FCC's exclusive authority in the field of satellite dish regulations remains intact. *See* 47 U.S.C. § 303(v).

Under the FCC's regulations, there is no requirement that satellite dish providers obtain prior written consent from landlords for installation of satellite dish equipment on rental property. On the contrary, a requirement to obtain prior written consent for installation of satellite dish equipment is inconsistent with the FCC's mandate to remove restrictions, and to limit necessary

⁵ DIRECTV disputes that this is Dish Network's practice.

1 restrictions to those no more burdensome than necessary. *See In re Craig Wirth*, CSR 7861-O, 2010
 2 WL 4411023 (F.C.C. Nov. 5, 2010) (ruling that association's restriction prohibiting installation of
 3 antenna on exterior of unit was unenforceable against renter who installed a satellite dish antenna on
 4 his porch); *In re Philip Wojcikewicz*, CSR-6030-0, 2003 WL 22227634 (F.C.C. Sept. 25, 2003)
 5 (ruling that association's restrictions requiring prior written consent for installation of antenna on
 6 petitioner's roof deemed to be within his exclusive use violated the OTARD Rule); *In re CS*
 7 *Wireless Systems, Inc. d/b/a Omnivision of San Antonio*, CSR 4947-O, 1997 WL 631407 (F.C.C.
 8 Oct. 14, 1997) (ruling that association's restrictive covenants requiring prior written approval for
 9 antenna installation violated the OTARD Rule to the extent they impaired the installation,
 10 maintenance or use of over-the-air reception antennas). Written consent is no more valid than verbal
 11 consent and is far more burdensome, and may, as a practical matter, inhibit the installation of
 12 satellite dishes when landlords do not timely return written release forms or are not in a position to
 13 provide written consent (e.g., if they are not on the premises or do not have access to fax or email, at
 14 the time the request is made).

15 Jacen's requested nationwide injunction amounts to a court-ordered rulemaking. By
 16 proceeding in this Court rather than the FCC, Jacen seeks to circumvent the formal procedures
 17 already put in place by the FCC to review rulemaking proposals. Pursuant to 47 C.F.R. § 1.401,
 18 "[a]ny interested person may petition [the FCC] for the issuance, amendment or repeal of a rule or
 19 regulation." 47 C.F.R. § 1.401(a). *See also Nat'l Science & Tech. Network, Inc. v. F.C.C.*, 397 F.3d
 20 1013, 1014 (D.C. Cir. 2005) (noting there are formal procedures to petition FCC for rulemaking).
 21 Given that Congress vested broad powers in the FCC to regulate direct-to-home satellite services, it
 22 would be improper for this Court to interfere with the FCC's rulemaking functions. *See Building*
 23 *Owners & Managers Ass'n Int'l v. F.C.C.*, 254 F.3d 89, 92 (D.C. Cir. 2001) (The Commission may
 24 "perform any and all acts, make such rules and regulations, and issue such orders ... as may be
 25 necessary in the execution of its functions.") (*citing* 47 U.S.C. § 154(i)); *see also Opera Plaza*
 26 *Residential Parcel Homeowners Ass'n v. Hoang*, No. C. 02-01084 WHA, 2002 WL 1787214 (N.D.
 27 Cal. July 22, 2002) (Alsup, J.), *aff'd*, 376 F.3d 831, 836 (9th Cir. 2004) (noting FCC's power to
 28 promulgate regulations concerning direct-to-home satellite services).

1 Notably, the FCC permits parties to “petition the Commission for a declaratory ruling
 2 under § 1.2 of this chapter, or a court of competent jurisdiction, to determine whether a particular
 3 restriction is permissible or prohibited under this section.” 47 C.F.R. § 1.4000(e). This limited
 4 authorization for the judicial resolution of the validity of a particular restriction on an antennae or
 5 satellite dish installation is distinctly different from rulemaking. The FCC has retained exclusive
 6 jurisdiction for rulemaking, pursuant to the Telecommunications Act of 1996. 47 U.S.C. § 303(v).
 7 With its sweeping nationwide mandatory injunction, Jacen seeks to adjudicate far more than the
 8 issue of whether three satellite dishes have been installed at its Connecticut building in compliance
 9 with the OTARD Rule. In effect, Jacen is asking the Court to significantly alter the legal
 10 requirements governing DIRECTV’s established practice of conducting satellite installations,
 11 regardless of the regulatory and industry-wide consequences that such an injunction would
 12 necessarily involve.

13 Under California law, equitable abstention is appropriate where, as here, a plaintiff
 14 asks the court to adjudicate conduct under the UCL that implicates a complex regulatory scheme
 15 devised and administered by a specific governmental agency with expertise in the area. *See*
 16 *Shamsian*, 136 Cal. App. 4th at 641. In *Shamsian*, the plaintiff filed a class action suit, alleging that
 17 defendants failed to provide convenient, economical, and efficient beverage container redemption
 18 opportunities to consumers, in violation of the Beverage Container Recycling and Litter Reduction
 19 Act (the “Recycling Act”) and the UCL. In affirming the trial court’s dismissal of the action on
 20 equitable abstention grounds, the *Shamsian* court explained, “the complex statutory arrangement of
 21 requirements and incentives involving participants in the beverage container recycling scheme is to
 22 be administered and enforced by the [Department of Conservation] consistent with the Legislature’s
 23 goals.” *Id.* at 642.

24 *Shamsian* is instructive here. Just as the plaintiff in *Shamsian* sought to impose
 25 affirmative duties that were not required under the Recycling Act on defendants under the guise of a
 26 UCL violation, Jacen’s request for injunctive relief requiring DIRECTV to change its installation
 27 authorization policy seeks to impose an affirmative duty upon DIRECTV that is not mandated under
 28 the FCC regulations. DIRECTV need only comply with the FCC’s rules as they exist, not as Jacen

believes the rules should be. The appropriate channel for Jacen to seek its requested relief is to file a petition for rulemaking with the FCC, pursuant to 47 C.F.R. § 1.401(a), and not by means of a court-imposed injunction, which threatens to undermine the FCC's regulatory authority in this field. The Court should, therefore, dismiss Jacen's UCL claim under the doctrine of equitable abstention. *See Reudy v. Clear Channel Outdoor, Inc.*, No. 02-5438 SC, 2010 WL 4918792, at *1 (N.D. Cal. Nov. 29, 2010) (dismissing UCL claim under equitable abstention doctrine, where the injunctive relief sought could have thrown city agency's policy "out of balance"); *Alvarado v. Selma Convalescent Hosp.*, 153 Cal. App. 4th 1292, 1303-04 (2007) (affirming demurrer where adjudicating class action suit "would require the trial court to assume general regulatory powers over the health care industry through the guise of enforcing the UCL, a task for which the courts are not well-equipped").

D. Jacen Fails To Allege The Required Element Of Injury In Fact For Its UCL and Negligence Claims.

To plead injury in fact, Jacen must allege a concrete and particularized injury that is actual, and not hypothetical. *See Renee v. Duncan*, 623 F.3d 787, 796-97 (9th Cir. 2010). The Complaint fails to allege several essential facts necessary to establish injury in fact.

First, Jacen alleges only that Equipment installation occurred "in areas of the Property," without alleging the specific location or what method of installation was used. Such facts are necessary because, as discussed above, the regulation of satellite dish installations on residential rental property implicates the FCC's OTARD Rule. *See* 47 C.F.R. § 1.4000(a). The OTARD Rule "prohibits governmental and non-governmental restrictions that impair a viewer's ability to receive video programming through devices designed for over-the-air reception of DBS, MDS, or television broadcast signals." *Second Report and Order*, 1998 WL 888546, at *71027. In 1998, following an extensive notice and public comments period, the FCC issued an amendment to the OTARD Rule, extending the Rule to apply to antenna restrictions "on rental property where the viewer has exclusive use or control." 47 C.F.R. § 1.4000(a). The Rule provides:

(a)(1) Any restriction, including but not limited to any state or local law or regulation, including ... building regulations, or any private covenant, contract provision, **lease provision, homeowners' association rule or similar restriction**, on property within the exclusive use or control of the antenna user ... that impairs the installation, maintenance, or use of [a § 207 device] ... [is prohibited]

(3) For the purposes of this section, a law, regulation or restriction impairs installation, maintenance or use of an antenna if it: (i) Unreasonably delays or prevents installation, maintenance or use; (ii) Unreasonably increases the cost of installation, maintenance or use; or (iii) Precludes reception or transmission of an acceptable quality signal.

47 C.F.R. § 1.4000(a) (emphasis added).

Accordingly, pursuant to the OTARD Rule, lessees of property are permitted to install DIRECTV satellite dishes *without* obtaining landlord consent in spaces under their exclusive use or control within their leasehold.⁶ As described by the FCC,

In practice, under the amendment to our rules, renters will be able, subject to the terms of the Section 207 rules, to install Section 207 reception devices **wherever they rent space outside of a building, such as balconies, balcony railings, patios, yards, gardens or any other similar areas.**

Second Report and Order, ¶ 3, 1998 WL 888546, at * 71028 (emphasis added); 47 C.F.R. § 1.4000(a)(1). A requirement that DIRECTV obtain prior written approval from the landlord – Jacen’s requested relief – “unreasonably delays” the installation, increases the cost for subscribers, and is barred by the OTARD Rule.

In light of the FCC’s regulatory scheme, DIRECTV is not obligated to obtain Jacen’s consent to install Equipment in areas within the exclusive use or control of its tenants. In the absence of facts establishing the actual location of the installed Equipment, an allegation that DIRECTV installed Equipment in “areas” of Jacen’s property without its consent is entirely inadequate to establish that DIRECTV’s Permission Form or its alleged installation of Equipment caused any injury.⁷ Accordingly, its claims fail and the complaint should be dismissed.⁸

⁶ Certain restrictions are permitted under the OTARD Rule if they serve a legitimate safety or historical preservation objective and are narrowly tailored to accomplish this objective. 47 C.F.R. § 1.4000(b).

⁷ The allegation that DIRECTV installed Equipment “illegally” at Jacen’s property (Cmplt. ¶ 18), is entirely conclusory and is not entitled to a presumption of truth. *See Epstein*, 83 F.3d at 1140 (conclusory allegations of law and unwarranted inferences are not sufficient). Equally unavailing is Jacen’s generalized pleading that a tenant lacks control “over the exterior walls, roof or building common areas pursuant to a residential lease ...” Cmplt., ¶ 10. The scope of a tenant’s rights turns on the terms of his particular lease and Jacen fails to attach any lease to this complaint or quote any terms.

⁸ Furthermore, the OTARD Rule provides DIRECTV with a “safe harbor” defense from Jacen’s UCL claims. *See Suzuki v. Hitachi Global Storage Tech., Inc.*, No. C 06-07289 MHP, 2007 WL 2070263, at *3 (N.D. Cal. July 17, 2007) (“Under California law, a defendant is not liable under section 17200 of the California Business and Professions Code for conduct that is clearly permitted

Second, Jacen fails to allege that it did not give consent for the installation of satellite dish equipment on its property by DIRECTV. Jacen alleges only that: “Within the past three years, Defendant has provided its service to at least three tenants of residential units at Defendant’s [sic] Property, and has permanently and illegally installed and maintained the Equipment in areas of the Property without obtaining any authorization from Plaintiff.” Cmplt., ¶ 18. Although the Complaint alleges that DIRECTV did not obtain authorization directly from Jacen prior to installation of Equipment on Jacen’s property, there is no allegation Jacen did not grant authorization directly to its tenants, as stated in the Permission Forms. If Jacen gave its consent to the installations to its tenants, then it has suffered no injury. *E.g., Civic Western Corp. v. Zila Indus., Inc.*, 66 Cal.App.3d 1, 16-17 (1977) (“The essence of the cause of action for trespass is an ‘unauthorized entry’ onto the land of another. . . . Where there is a consensual entry, there is no tort, because lack of consent is an element of the wrong.”) There is no obligation DIRECTV itself obtain consent from the landlord. Again, the complaint inadequately alleges injury and should be dismissed.

E. For The Same Reasons, Jacen Lacks Standing.

Because the Complaint does not sufficiently allege injury in fact, Jacen’s UCL and negligence claims must also be dismissed for lack of standing. Standing is a threshold issue under Article III of the Constitution and, accordingly, must be satisfied for all claims brought before this Court. Article III requires that: (1) plaintiff must have suffered a concrete and particularized “injury in fact” that is actual, not hypothetical; (2) there is a causal connection between the injury and the conduct complained of; and (3) it must be likely, not merely speculative, that the injury will be redressed by a favorable decision. *Renee v. Duncan*, 623 F.3d 787, 796-97 (9th Cir. 2010) (*citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992)). In addition, following the enactment of Proposition 64 in 2004, a UCL claim may be brought only by a “person who has suffered injury in fact and has lost money or property as a result of the unfair competition.” Cal. Bus. & Prof. Code § 17204. A plaintiff does not satisfy the standing requirement “when ‘speculative inferences’ are necessary to establish either injury or the connection between the

by the legislature.”) (*citing Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 182 (1999)).

1 alleged injury and the act challenged.” *Sanders v. Apple Inc.*, 672 F. Supp. 2d 978, 984 (N.D. Cal.
2 2009).

3 For the reasons explained above in Section III.D, Jacen fails to sufficiently allege
4 injury in fact, which is a threshold requirement under Article III and Proposition 64. Therefore,
5 Jacen lacks standing to pursue the claims against DIRECTV set forth in the complaint. *See Birdsong*
6 *v. Apple, Inc.*, 590 F.3d 955, 960-61 (9th Cir. 2009) (plaintiffs lacked standing where they did not
7 sufficiently allege injury in fact); *Jadeja v. Redflex Traffic Sys. Inc.*, No. C 10-04287 WHA, 2011
8 WL 499967, at *3 (N.D. Cal. Feb. 8, 2011) (Alsup, J.) (dismissing complaint for lack of standing
9 where plaintiff failed to show that defendants “invaded his alleged interest in freedom from unfair or
10 unlawful business practices”); *Lorenzo v. Qualcomm Inc.*, No. 08cv2124 WQH (LSP), 2009 WL
11 2448375, at *6 (S.D. Cal. Aug. 10, 2009) (lack of standing where the connection between plaintiff’s
12 purported injury and defendant’s allegedly wrongful conduct was “remote, attenuated and
13 consequential”).

14 **F. Jacen’s UCL Claim Should Be Dismissed For Failure To Allege Unfair Conduct**
15 **As a Matter of Law.**

16 California’s UCL prohibits any “unlawful, unfair or fraudulent business act or
17 practice.” Cal. Bus. & Prof. Code § 17200 *et seq.* Jacen alleges that DIRECTV violated the
18 “unfair” prong of the UCL by: (1) “[e]ntering and encroaching” upon Jacen’s property and
19 installing satellite dish equipment without Jacen’s authorization, and (2) “[a]dopting and
20 implementing” a policy and practice through use of Part 2 of the Release Form that enables the
21 alleged unauthorized installation of satellite dish equipment upon Jacen’s property. Cmpl’t., ¶ 30.
22 Neither of these alleged practices, however, constitutes an “unfair” business practice in violation of
23 the UCL.

24 **1. Jacen Fails to Allege Sufficient Facts To Establish Unfairness Under the**
25 **Cel-Tech “Tethering” Test**

26 It has been noted that “California’s unfair competition law, as it applies to consumer
27 suits, is currently in flux.” *Lozano v. AT&T Wireless Servs. Inc.*, 504 F.3d 718, 735 (9th Cir. 2007).
28 In *Lozano*, the Ninth Circuit explained that the California Supreme Court had rejected the use of a

balancing test for claims based on the “unfairness” prong of the UCL, as being “too amorphous” and providing “too little guidance to courts and businesses” for unfair business practice actions between competitors. *Id.* (citing *Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 185 (1999)). Prior to the *Cel-Tech* decision, California appellate courts had broadly construed the definition of “unfair” to refer to any business practice that “offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.” See *South Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal. App. 4th 861, 886-87 (1999) (internal citation omitted); see also *Smith v. State Farm Fire*, 93 Cal. App. 4th 700, 718 (1992) (under the balancing test, the court “must weigh the utility of the defendant’s conduct against the gravity of the harm to the alleged victim.”).

The *Cel-Tech* court deemed it necessary to devise a “more precise test for determining what is unfair under the unfair competition law.” 20 Cal. 4th at 185. Under the *Cel-Tech* test, conduct is “unfair” when it “threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.” *Id.* at 187. Thus, to establish an unfair practice claim, the court required “that any finding of unfairness to competitors under section 17200 be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition.” *Id.* at 186-87.

Despite the fact that some California courts have read *Cel-Tech* literally to apply only to cases involving competitors, many courts, including this Court, have applied the *Cel-Tech* test to consumer actions, finding “the rationale of *Cel-Tech* nonetheless compels the conclusion that the unfairness prong must be tethered to some legislative policy, otherwise the courts will roam across the landscape of consumer transactions picking and choosing which they like and which they dislike.” *Morris v. BMW of North Am., LLC*, No. C 07-02827 WHA, 2007 WL 3342612, at *8 (N.D. Cal. Nov. 7, 2007) (Alsup, J.); *Van Slyke v. Capital One Bank*, No. C 07-00671 WHA, 2007 WL 3343943, at *11 (N.D. Cal. Nov. 7, 2007) (Alsup, J.) (“in this Court’s judgment ... the unfairness prong must also be tethered to some legislative policy”); see also *Churchill Village, L.L.C. v. Gen. Elec. Co.*, 169 F. Supp. 2d 1119, 1130 & n. 10 (N.D. Cal. 2000) (applying *Cel-Tech* test to consumer

UCL action); *Simila v. Am. Sterling Bank*, No. 09-CV-781 JLS (CAB), 2010 WL 3988171, at *6 (S.D. Cal. Oct. 12, 2010) (finding that the “tethering” test is “more in line with the California Supreme Court’s reasoning in *Cel-Tech*” in consumer actions); *Tourgeman v. Collins Fin. Servs., Inc.*, No. 08-CV-01392-JLS-NLS, 2009 WL 6527757, at *7 (S.D. Cal. Aug. 6, 2009) (finding that “the reasoning of the California Supreme Court in *Cel-Tech* leads logically to an application of the ‘tether’ test to consumer UCL suits”).⁹

Under the *Cel-Tech* tethering test, for an alleged unfair practice to violate the UCL, it must be comparable to an actual violation of legislative policy or spirit of law. *Cel-Tech*, 20 Cal. 4th at 186-87. Jacen attempts to tether DIRECTV’s Permission Form to California Penal Code § 602, a California state criminal statute prohibiting willful trespass. Cmpl’t., ¶ 32. Jacen alleges that “DIRECTV’s aforementioned policies, practices and conduct are inconsistent with the legislatively declared policies embodied in California Penal Code § 602, including without limitation Penal Code § 602(m).” *Id.*

California Penal Code § 602(m) provides that any person who willfully commits a trespass by “[e]ntering and occupying real property or structures of any kind without the consent of the owner, the owner’s agent, or the person in lawful possession” is guilty of a misdemeanor.¹⁰ The California Supreme Court has stated that Section 602(m) “requires occupation of the property, a ‘nontransient, continuous type of possession.’” *In re Catalano*, 29 Cal. 3d 1, 10 n. 8 (1981). Furthermore, it is not a violation of Section 602(m) “to enter private property without consent unless such entry is followed by occupation thereof without consent. Nor is it a violation to occupy without consent if the entry be made with consent.” *People v. Wilkinson*, 248 Cal. App. 2d Supp. 906, 909-10 (1967) (finding defendants’ temporary campsite on private property did not violate California Penal Code § 602(m)); *see also Edgerly v. City & County of San Francisco*, 599 F.3d 946, 954 (9th Cir. 2010) (finding that police officers lacked probable cause to arrest plaintiff for violating Cal.

⁹ The application of the *Cel-Tech* test is even more compelling here, because Jacen is a limited liability real estate company, not a consumer. Cmpl’t., ¶ 3. Thus, the reasoning for why some courts apply the balancing test instead of the *Cel-Tech* test to consumer actions does not apply. *See Bardin v. Daimlerchrysler Corp.*, 136 Cal. App. 4th 1255, 1268 (2006).

¹⁰ In 2003, California Penal Code § 602(l) was re-lettered as California Penal Code § 602(m). There were no substantive changes to this provision.

1 Penal Code § 602(m) by loitering on private property).

2 The legislative purpose of § 602(m) was “to prevent squatter occupancy.” *See* 2
3 Witkin, *California Criminal Law, The Trespass Statute* § 248 (3d ed. 2000), at 278. The California
4 legislature’s intent in enacting Penal Code § 602(m) is further evidenced by the statement of urgency
5 which accompanied the passage of Assembly Bill 1732 (Penal Code, Section 602(m)) in 1945. The
6 statement reads:

7 This act is hereby declared to be an urgency measure. A statement of
8 the facts constituting such necessity is as follows: The tremendous
9 increase in the population of this State in the last few years, resulting
10 in a particularly heavy influx of people into the centers of defense
11 industries and areas near military camps, has led to a serious housing
shortage. In consequence, there has been an alarming increase in
squatter occupancy of lands by lawless and irresponsible persons. This
evil should be corrected at once. To enable the authorities to stamp out
this epidemic, it is necessary that this act take immediate effect.

12 *See Wilkinson*, 248 Cal. App. 2d Supp. at 910 (*quoting* Cal. Penal Code § 602(m) legislative
13 history).

14 Implausibly, Jacen asks this Court to infer that the public policy underlying California
15 Penal Code § 602(m) forms the predicate basis for Jacen’s two-part UCL claim. Yet, nowhere in the
16 Complaint does Jacen explain how or why (1) installation of satellite dish equipment on Jacen’s
17 property located in Hartford, Connecticut by professional installers in Connecticut, or (2)
18 implementation of a corporate policy vis-à-vis Part 2 of the Release Form amounts to a violation or
19 inconsistency with a California criminal trespass statute, enacted to address settlement on land in
20 California by squatters. To the extent that there have been any unauthorized satellite dish
21 installations on common or restricted access areas of Jacen’s property – which, as noted earlier, has
22 not been explicitly pled in the complaint – the residential leases between Jacen and its tenants are
23 implicated – not a California criminal trespass statute.

24 To be clear, Jacen alleges no facts other than DIRECTV’s use of Part 2 of the
25 Installation Permission Form in support of its unfair practice claim. Jacen does not allege that it is
26 DIRECTV’s practice to perform installations without first seeking landlord consent through use of
27 the Permission Form. *See* Cmplt., ¶ 19 (class consists of landlords owning properties where
28 DIRECTV performed installations after obtaining completed Part 2 of the Permission Form). Nor

1 does Jacen allege that DIRECTV instructs or encourages its subscribers to falsify their consent
 2 forms. Jacen also fails to allege that any of its three tenants in fact falsified their consent forms by
 3 completing Part 2 without obtaining Jacen's consent.¹¹ The tenant, of course, is the person with the
 4 relationship to the landlord and is in the best position to obtain consent, not DIRECTV. Moreover,
 5 the tenant, not DIRECTV, knows the scope of his lease and whether landlord authorization is
 6 required for installation in a particular location. In short, DIRECTV's alleged wrongful practice
 7 consists of instructing the tenant in writing that he may need authorization from his landlord for
 8 installation of DIRECTV Equipment and relying on him to obtain it. These allegations are
 9 insufficient to establish any wrongful conduct by DIRECTV, let alone wrongful conduct that is
 10 comparable to a criminal trespass violation under California law.

11 In light of Jacen's failure to plead any wrongful conduct by DIRECTV that can be
 12 properly tethered to the legislative policy underlying Penal Code § 602(m), Jacen's UCL claims
 13 should be dismissed for failure to satisfy the *Cel-Tech* tethering test. *See Simila*, 2010 WL 3988171,
 14 at *6 (granting 12(b)(6) dismissal where plaintiffs did not sufficiently "tether" their allegations
 15 regarding defendants' alleged unfair conduct in servicing loans without regard to plaintiffs' financial
 16 condition to any underlying law); *see also Phipps v. Wells Fargo Bank, N.A.*, No. CV F 10-2025
 17 LJO SKO, 2011 WL 302803, at *16-*17 (E.D. Cal. Jan. 27, 2011) (granting 12(b)(6) dismissal of
 18 UCL unfair claim where plaintiff alleged "nothing meaningful" to substantiate an UCL unfair
 19 practice claim); *Gregory v. Albertson's, Inc.*, 104 Cal. App. 4th 845, 855 (2003) (rejecting plaintiff's
 20 unfair practice claim where plaintiff sought "an extension of the policy that depart[ed] from the
 21 primary focus of the statute"); *Scripps Clinic v. Super. Ct.*, 108 Cal. App. 4th 917, 941 (2003)

22
 23 ¹¹ Instead, Jacen stops short of such a claim, pleading that "DIRECTV has financial incentive to
 24 obtain as many subscribers as possible" and that "tenants have little interest in obtaining their
 25 landlord's written permission when offered the simple alternative of providing DIRECTV with
 26 Release Form Part 2, which they could easily complete without actually obtaining any permission at
 27 all" Cmplt., ¶ 13. If Jacen intends to insinuate that its tenants have fraudulently executed
 28 consent forms, the complaint does not plead this allegation with sufficient particularity, nor does it
 warrant an inference that DIRECTV has engaged in any fraudulent conduct. *See Rosal v. First Fed.
 Bank of Cal.*, 671 F. Supp. 2d 1111, 1127 (N.D. Cal. 2009) ("when averments of fraud are made, the
 circumstances constituting the alleged fraud [must] be specific enough to give defendants notice of
 the particular misconduct so that they can defend against the charge and not just deny that they have
 done anything wrong."); *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009) (applying
 Fed. R. Civ. P. 9(b) heightened pleading standard to UCL claim sounding in fraud).

(rejecting plaintiffs' unfair practice claim where plaintiffs attempted to tether alleged unfair practice to a right that did not exist).

2. The Complaint Fails to Allege Sufficient Facts Under the Other Unfair Practices Tests.

Even if the Court were to apply the balancing test criticized in *Cel-Tech* to Jacen's UCL claim, it still would fail as a matter of law because Jacen's allegations consist of nothing more than a formulaic recitation of the *South Bay* balancing test, without any facts alleged to support the claims. Jacen pleads only that: "These acts offend established public policies or are immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers. Alternatively, these acts cause harm to class members which outweigh any utility flowing from them." Cmpl't., ¶ 31. The mere "formulaic recitation" of the pre-*Cel-Tech* legal standard in the Complaint is not sufficient to state a claim under *Twombly*. See *Twombly*, 550 U.S. at 555 ("a formulaic recitation of the elements of a cause of action will not do"). Nothing about DIRECTV's Permission Form or its installation practice, as alleged by Jacen in the complaint, supports a finding that DIRECTV's conduct was immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. Jacen concedes that DIRECTV "requires its subscribers to execute a written release form" prior to the installation of DIRECTV Equipment on rental property. Cmpl't., ¶ 11. Furthermore, the complaint fails to allege that DIRECTV has done anything to encourage, facilitate, or participate in any conduct by Jacen's tenants to avoid obtaining installation authorization. In short, the complaint's allegations cannot establish that DIRECTV's installation procedure caused harm to Jacen or the other class members. On the contrary, there is significant utility in permitting tenants to obtain verbal authorization from landlords for installations, including the practical considerations that landlords are often easier to reach via telephone and may not be on the premises at the time the request is made. Therefore, Jacen's UCL claims do not amount to an unfair practice even under the *South Bay* balancing test. See *Buena Vista, LLC v. New Resource Bank*, No. C 10-01502 CW, 2011 WL 250361, at *7 (N.D. Cal. Jan. 26, 2011) (granting 12(b)(6) dismissal of UCL unfair claim under the policy standard where "none of the acts alleged amount[ed] to unscrupulous conduct").

Jacen also pleads an unfair practice claim under the Federal Trade Commission

1 (“FTC”) section 5 standard.¹² Cmplt., ¶ 32. This Court has observed that the Ninth Circuit
 2 “expressly rejected that test in *Lozano*, stating that while ‘*Cel-Tech* effectively rejects the balancing
 3 approach, we do not agree that the FTC test is appropriate in this circumstance.’” *Morris*, 2007 WL
 4 3342612, at *7. Therefore, according to the Ninth Circuit, “the remaining options are to apply *Cel-*
 5 *Tech* directly ... and require that the unfairness be tied to a ‘legislatively declared’ policy or to
 6 adhere to the former balancing test under *South Bay*.” *Lozano*, 504 F.3d at 736 (internal citations
 7 omitted). Nevertheless, even under the section 5 test, Jacen’s UCL claims warrant dismissal,
 8 because Jacen merely recites the section 5 test, without alleging any facts to support any of the three
 9 factors.

10 **IV. CONCLUSION**

11 For the foregoing reasons, the Court should grant DIRECTV’s motion to dismiss
 12 Jacen’s Complaint in its entirety.

13
 14
 15 DATED: March 15, 2011

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 SAYAKA KARITANI
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18 /s/ Andrew E. Paris

Andrew E. Paris

19 Attorneys for Defendant
 20 **DIRECTV, INC.**

21
 22
 23
 24
 25
 26
 27 ¹² The “Section 5” test is: (1) the consumer injury must be substantial; (2) the injury must not be
 28 outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury
 that consumers themselves could not reasonably have avoided. 15 U.S.C. § 45(n); *see also*
Camacho v. Auto. Club of Southern Cal., 142 Cal. App. 4th 1394 (2006).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that counsel of record who are deemed to have consented to electronic service are being served with a copy of this **DIRECTV'S NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM IN SUPPORT THEREOF**, via the Court's CM/ECF system per Local Rule CV-5(a)(3) on March 15, 2011. Any other counsel of record was served via First Class Mail.

/s/ Andrew E. Paris
Andrew E. Paris